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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2009
Decided October 27, 2009

No. 05-5284
FRANK A. SKINNER,
APPELLANT
v.
UNITED STATES DEPARTMENT OF JUSTICE
AND BUREAU OF PRISONS,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 04cv01376)

Yvonne M. Williams, appointed by the court, argued the cause as *amicus curiae* in support of appellant. With her on the brief was *Anthony F. Shelley*, appointed by the court.

Frank A. Skinner, pro se, filed the briefs for appellant.

W. Mark Nebeker, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney at the time the brief was filed, and *R. Craig Lawrence*, Assistant U.S. Attorney. *Lisa S. Goldfluss*, Assistant U.S. Attorney, entered an appearance.

Before: GARLAND, *Circuit Judge*, and EDWARDS and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: A Bureau of Prisons hearing officer found prisoner Frank Skinner guilty of possessing drug paraphernalia and imposed sanctions that included the loss of 40 days of good-time credits. Skinner sued the agency under the Privacy Act, 5 U.S.C. § 552a, seeking damages and amendment of his prison records. The district court dismissed both claims on the ground that inmate records are exempt from the relevant provisions of the Act. We affirm that reasoning with respect to Skinner's claim for amendment of his records. We affirm the court's dismissal of Skinner's damages claim on the alternative ground that such a claim is not cognizable unless Skinner first secures relief through a writ of habeas corpus.

I

Frank Skinner is a federal prisoner who was housed at a Bureau of Prisons (BOP) facility in Atlanta, Georgia. On November 27, 2001, staff at the facility searched Skinner's cell and locker and found a white powder that tested positive for cocaine. *Skinner v. U.S. Dep't of Justice*, No. 04-1376, 2005 WL 1429255, at *1 (D.D.C. filed June 20, 2005). BOP conducted an internal disciplinary hearing on January 28, 2002. At the hearing, Skinner testified that the substance found in his locker was "[T]ide

washing powder," which the hearing officer noted in his report. *See* Discipline Hearing Officer Report (Feb. 5, 2002). The officer, however, found that Skinner had actually possessed cocaine and imposed sanctions that included the loss of 40 days of good-time credits[1], 60 days of disciplinary segregation, the denial of visitation rights for a year, and the denial of commissary privileges for 180 days. BOP also referred the matter to the FBI, which declined to prosecute Skinner because the case would not "result in a criminal prosecution of greater penal consequences than which can be imposed by the BOP administrative remedies and actions." Letter from T. Jackson to G. Duncan (Feb. 12, 2002).

Skinner filed a number of administrative appeals within BOP, and on July 8, 2002, he also filed a Freedom of Information Act request with the FBI. The FBI informed Skinner that its records contained 18 pages that were responsive to his request. Because the documents had originated with BOP, the FBI referred the request to BOP, which released the documents to Skinner on August 15. One of the documents was the referral form BOP had sent to the FBI. The form contained a typed paragraph stating that chemical tests conducted by BOP indicated the white powder in Skinner's locker was cocaine. Below that paragraph was the

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[1] Pursuant to 18 U.S.C. § 3624(b), a federal prisoner who complies with disciplinary regulations is eligible to receive credits -- known as good-time credits -- of up to 54 days per year toward the service of the prisoner's sentence.

following handwritten notation: "Actually laundry detergent." Referral of an Inmate Matter for Investigation (Dec. 12, 2001). There is no evidence in the record regarding who made the notation or what was meant by it. Skinner alleges that it reflects the results of an "independ[e]nt analysis" of the powder by the FBI, Pl.'s Mot. to Alter or Amend J. at 2, but also acknowledges that "[n]one of the suspected contraband was forwarded" to the FBI "for laboratory testing," Pl.'s Authentication or Identification to Compl. Doc. Ex. "A."

On August 13, 2004, Skinner filed a pro se complaint in the United States District Court for the District of Columbia, alleging that the powder found in his locker was laundry detergent rather than cocaine, that the FBI referral form indicated as much, and that his BOP file was therefore inaccurate. He requested two remedies under the Privacy Act, 5 U.S.C. § 552a. First, he sought money damages for the punishments BOP had imposed on the basis of its finding that he possessed cocaine. Second, Skinner alleged that the "[a]genc[y] did not meet requirements of [the] Privacy Act by indicating that [the] inmate disputed information in his files." Compl. at 1. The district court treated this as a request for amendment of Skinner's records. *Skinner*, 2005 WL 1429255, at *1 & n.2.

BOP filed a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment. BOP argued, first, that the complaint should be dismissed because BOP had exempted inmate records from the relevant provisions of the Privacy Act. Second, BOP maintained that Skinner's

amendment claim was barred because he had failed to exhaust administrative remedies. Finally, in a footnote, BOP offered a "third and independent ground for dismissal." Citing *Razzoli v. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000), the agency contended that Skinner's "claims could only be filed in the context of a *habeas corpus* action." Mem. in Support of Defs.' Mot. to Dismiss and/or for Summ. J. at 10 n.2. On June 20, 2005, the district court granted the motion to dismiss on the first ground urged by BOP: that the records were exempt.

On July 12, 2005, Skinner filed an appeal of that judgment, and on August 5 he filed a "Motion to Alter or Amend Judgment" with the district court, arguing that the disciplinary hearing he was challenging had taken place before BOP promulgated the exemption that the court applied to his damages claim. A panel of this court ordered the appeal held in abeyance so that the district court could consider Skinner's motion, which the district court ultimately denied on March 31, 2008. On October 16, 2008, BOP filed a motion for summary affirmance in this court, which we denied. Thereafter, we appointed amicus curiae to present arguments in support of Skinner's position.

II

The Privacy Act imposes a set of substantive obligations on agencies that maintain systems of records, including the requirement that records used in making determinations about individuals be accurately maintained. *See* 5 U.S.C. § 552a(e)(5). The Act also provides civil remedies for its violation, including court-ordered amendment of records and

money damages. The district court dismissed both Skinner's amendment and damages claims for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). Our review is therefore de novo. *Razzoli*, 230 F.3d at 374. We address Skinner's claim for amendment in Part II.A and his claim for damages in Part II.B.

A

Skinner's suit seeks amendment of his inmate records, although the kind of amendment he seeks is not entirely clear. In places, Skinner's pleadings appear to request an amendment indicating that he possessed laundry detergent rather than cocaine. *See* Amicus Curiae Br. 11 (noting that Skinner filed administrative appeals "to have his records amended to accurately reflect that the substance found in his locker was laundry detergent"). In other places, the pleadings suggest that he merely wants his file to include the form containing the handwritten notation, "[a]ctually laundry detergent." *See* Amicus Curiae Reply Br. 5. Regardless of the nature of the amendment sought, this claim is quickly dispatched.

Privacy Act § 552a(e)(5) requires agencies to ensure that any records used in "making any determination about any individual" are "maintain[ed] . . . with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Section 552a(d) requires agencies to entertain requests for amendment of records that are not "accurate, relevant, timely, or complete." *Id.* § 552a(d)(2). If an

agency rejects a request for amendment, the subject of the contested record can bring suit in federal court and obtain de novo consideration of whether amendment is warranted. *Id.* § 552a(g)(1)(A), (g)(2)(A). If the court so finds, it "may order the agency to amend the individual's record." *Id.* § 552a(g)(2)(A); *see generally Doe v. United States*, 821 F.2d 694, 697 & n.8 (D.C. Cir. 1987) (en banc).

But the Privacy Act also permits agencies to exempt certain of their systems of records from many of the obligations it imposes. 5 U.S.C. § 552a(j). In 1976, BOP exempted its Inmate Central Records System from § 552a(d)'s amendment provision. *See* 28 C.F.R. § 16.97(a); Exemption of Record Systems Under the Privacy Act, 41 Fed. Reg. 12,640, 12,650 (Mar. 26, 1976). As the district court found, as our precedents make clear, and as amicus acknowledged at oral argument, that exemption prevents us from ordering the amendment of an inmate's records. *See White v. U.S. Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998); *Risley v. Hawk*, 108 F.3d 1396, 1397 (D.C. Cir. 1997); Oral Arg. Recording at 2:48-3:12. Accordingly, we affirm the district court's dismissal of Skinner's amendment claim.

B

Skinner also seeks damages for the consequences of the alleged inaccuracy in his records.

As we have noted, Privacy Act § 552a(e)(5) requires agencies to ensure that all records "used by

the agency in making any determination about any individual" are maintained "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Section 552a(g)(1)(C) permits an individual to bring a civil action against an agency if the agency "fails to maintain any record concerning [the] individual with such accuracy, relevance, timeliness, and completeness" and "consequently a determination is made which is adverse to the individual." *Id.* § 552a(g)(1)(C). If the court finds that the agency "acted in a manner which was intentional or willful," the United States is liable for "actual damages sustained by the individual as a result of" the agency's failure to properly maintain the record. *Id.* § 552a(g)(4); *see generally Doe*, 821 F.2d at 697 n.8. In sum, to make out a claim for damages, a "plaintiff must allege: inaccurate records, agency intent, proximate causation, and an 'adverse determination.'" *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002); *see Deters v. U.S. Parole Comm'n*, 85 F.3d 655, 657 (D.C. Cir. 1996).

The district court dismissed Skinner's damages claim on the same ground upon which it dismissed his amendment claim: that BOP had exempted inmate records from the provisions of the Privacy Act. But while BOP's 1976 regulation exempted prison records from Privacy Act § 552a(d), the provision regarding amendment of inaccurate records, that regulation did not exempt BOP records from § 552a(e)(5), the provision creating the duty to accurately maintain records "used . . . in making any

determination." *See Deters*, 85 F.3d at 658 n.2; *Phillips v.Hawk*, No. 98-5513, 1999 WL 325487, at *1 (D.C. Cir. Apr. 14, 1999). And as we explained in *Sellers v. Bureau of Prisons*, the damages provision of Privacy Act § 552a(g) provides a remedy for violations of § 552a(e)(5). 959 F.2d 307, 310 (D.C. Cir. 1992); *see Deters*, 85 F.3d at 657.

On August 9, 2002, BOP did promulgate a regulation exempting its records from § 552a(e)(5). *See* 28 C.F.R. § 16.97(j); Privacy Act of 1974: Implementation, 67 Fed. Reg. 51,754 (Aug. 9, 2002). Skinner's lawsuit was filed after thatdate, but his complaint is premised on a BOP disciplinary determination that took place seven months earlier. As a consequence, Skinner contends that it would be impermissibly retroactive to apply the § 552a(e)(5) exemption to his lawsuit. We need not resolve this issue, however, because there is another ground for dismissal that is clearly established by a series of decisions of both the Supreme Court and this circuit. Under those precedents, Skinner's civil damages claim is barred unless and until he successfully challenges the disciplinary hearing on which it is based through an action in habeas corpus.

The series of cases begins with *Preiser v. Rodriguez*, in which the Supreme Court held that a state prisoner cannot sue prison authorities under 42 U.S.C. § 1983[2] for injunctive relief to compel

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[2] Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

restoration of good-time credits because victory in such a suit would shorten the prisoner's sentence. 411 U.S. 475 (1973). As the Court explained, when a "state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus" even if his claim comes within the literal terms of § 1983. *Id.* at 500; *see id.* at 489-90. In *Heck v. Humphrey*, the Court extended this rule to a § 1983 suit seeking money damages -- but neither an injunction nor release -- for an unconstitutional conviction. 512 U.S. 477, 479, 487 (1994). *Heck* instructed courts to dismiss such a damages action if success would "necessarily imply the invalidity of [the] conviction or sentence[,] . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated" -- for example, by reversal on direct appeal or issuance of a writ of habeas corpus. *Id.* at 487. In *Edwards v. Balisok*, the Court applied *Preiser* and *Heck* to a case analogous to Skinner's: a state prisoner's § 1983 challenge to the procedures

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State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

employed in a disciplinary proceeding that resulted in revocation of his good-time credits. 520 U.S. 641 (1997). The prisoner sought neither restoration of those credits nor damages for their loss; he sought only damages for violations of procedural due process at his hearing. *Id.* at 645. Nonetheless, the Court concluded that his action was barred because "[t]he principal procedural defect complained of . . . would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," and would therefore shorten his sentence "absent a new hearing." *Id.* at 646-47. The prisoner had alleged that his hearing officer, motivated by "deceit and bias," *id.* at 647, had "concealed exculpatory witness statements" and otherwise denied him the opportunity to defend himself, *id.* at 644, 646. If those allegations were proven, the Court said, the disciplinary decision could not stand. *See id.* at 647. Accordingly, "'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'" *Id.* at 643 (quoting *Heck*, 512 U.S. at 487).

In *Muhammad v. Close*, the Court summarized this line of cases as follows. "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . ." 540 U.S. 749, 750 (2004). If success in a "damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence." *Id.* at 751.

The *Preiser-Heck-Balisok* trilogy involved suits by state prisoners under 42 U.S.C. § 1983. In *Razzoli v. Bureau of Prisons*, this court applied *Balisok* to a federal prisoner's claim for damages under the Privacy Act's accuracy provisions. Prison officials had found cocaine and a razor blade in Razzoli's cell and imposed "a sanction that included the loss of 60 days statutory good time credit." 230 F.3d at 373. Razzoli alleged "that the BOP staged the incident." *Id.* at 373. "The theory of Razzoli's Privacy Act claim," we explained, was "that BOP and the Parole Commission violated 5 U.S.C. § 552a(e)(5) by maintaining in their files and using a false record, the report of the drug possession incident, even though they knew it to be false." *Id.* at 374. We concluded that this claim "clearly runs afoul of *Balisok*" because, "[i]f BOP knowingly preserved and acted upon a totally invented record of drug possession, plainly the recision of good time would have to be overturned, thus accelerating Razzoli's release." *Id.*[3] Accordingly, we affirmed the dismissal of Razzoli's Privacy Act claim, instructing that he could refile it only if he were "successful in overturning [BOP's] actions through a petition for habeas." *Id.* at 376.[4]

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[3] Although we noted that there was "the possibility of renewed revocation of the good time credit in a new [untainted] hearing," that possibility did not change the analysis. *Razzoli*, 230 F.3d at 375; *see Balisok*, 520 U.S. at 646-47.

[4] *See White*, 148 F.3d at 1125 (holding that a prisoner's claim for damages under the Privacy Act, alleging that his presentence report contained

Skinner's claim for damages under the Privacy Act is virtually indistinguishable from the claims barred in *Balisok* and *Razzoli*. In order to obtain damages, Skinner must allege that "the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). And he does, contending that BOP "willfully relied upon incomplete and inaccurate records to discipline him unfairly for allegedly possessing cocaine." Amicus Curiae Br. 3; *see id.* at 9-10; Compl. at 3-4. In particular, Skinner asserts that "BOP fabricated its drug test results" and "purposely excluded the [allegedly exculpatory] Referral Form from [his] records in order to retaliate against or otherwise punish him" for an assault complaint he had filed against a prison guard. Amicus Curiae Br. 28-29; *see id.* at 28 (citing Compl. at 2-3); Pl.'s Mot. to Alter or Amend J., Ex. A (Regional Administrative Remedy Appeal). But "the due process requirements for a prison disciplinary proceeding are . . . not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence." *Balisok*, 520 U.S. at 647. If Skinner were to succeed in demonstrating that BOP intentionally or willfully maintained and acted upon a false record of drug possession, "plainly the recision of good time would have to be overturned, thus accelerating [Skinner's release." *Razzoli*, 230 F.3d at 374. As a consequence, he must first proceed in habeas, notwithstanding

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inaccuracies requiring him to serve more time, was not cognizable "unless the sentence has been invalidated in a prior proceeding").

that in this case he seeks only damages and not restoration of good time. *Id.* at 372- 73; *cf. Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (holding "that a state prisoner's § 1983 action is barred (absent prior invalidation) -- *no matter the relief sought* (damages or equitable relief) . . . -- *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration" (first emphasis added)).

Skinner contends that, even if his claim for damages for loss of good time must first proceed in habeas, the same is not true of his claims for "damages for other, separate disciplinary harms." Amicus Curiae Reply Br. 27. But although those other punishments -- namely, disciplinary segregation and the loss of visitation rights and commissary privileges -- did not affect the length of Skinner's incarceration, they are not "separate" from the punishment that did. As Skinner's complaint avers, all of his punishments resulted from the same "Incorrect Information" in his file -- and from the same finding of guilt at the same hearing on the basis of that information. Compl. at 1.[5] Amicus

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[5] *See* Compl. at 3 (complaining of the "adverse effect in record determining custody, classification, job, quarter assignment and the los[s] of forty (40) days good conduct credits"); Amicus Curiae Br. 7 (stating that, "[a]s a result" of the hearing officer's determination that Skinner was guilty, he "was denied visitation for a year, denied commissary privileges for 180 days, his good time credit was discounted 40 days, and he was placed in segregation or solitary confinement for 60 days").

conceded as much at oral argument.[6] Hence, because recovery for the "other, separate disciplinary harms" depends on overturning the adverse determination that also led to his loss of good-time credits, if Skinner were to win damages for the former, he would necessarily have demonstrated the invalidity of the latter.

Amicus insists that it is nonetheless possible to distinguish the two types of discipline. In amicus' view, we need not determine that the white powder was detergent rather than cocaine to vindicate Skinner's damages claim; we need only find that the records at Skinner's hearing were inaccurate or incomplete because they omitted the referral form. Had the hearing officer seen the form, amicus continues, that might have been enough to keep him from ordering Skinner held in segregation, even if not enough to prevent him from revoking Skinner's good-time credits. Amicus Curiae Reply Br. 28. But even on this theory, to obtain damages for being held in segregation Skinner still must show that BOP *intentionally or willfully* kept the allegedly exculpatory FBI form out of his disciplinary hearing. *See* 5 U.S.C. § 552a(g)(4); Amicus Curiae Reply Br. 3 (arguing that Skinner's "prison segregation [was] based on willfully inaccurate records"). And as we have explained above, if he were to succeed in making such a showing, that would "necessarily

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[6] *See* Oral Arg. Recording at 6:22-50 (agreeing that the good time, segregation, and commissary sanctions were all based on the same finding that Skinner possessed cocaine rather than detergent).

imply the invalidity of the deprivation of his good-time credits" as well, *Balisok*, 520 U.S. at 646-47. *See Razzoli*, 230 F.3d at 374.[7]

Finally, amicus urges us not to apply the habeas-channeling rule here because the district court did not rely on it. Instead, the court rested dismissal of Skinner's complaint on BOP's exemption of its records from the Privacy Act. But this court can "affirm a correct decision even if on different grounds than those assigned in the decision on review," a principle "particularly applicable when reviewing a dismissal for failure to state a claim, [which is] a pure question of law which we review *de novo*." *Razzoli*, 230 F.3d at 376 (internal quotation marks and citations omitted). Amicus does not dispute our authority in this regard, but correctly notes that we generally do not decide cases on grounds that were not raised in the district court,

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[7] Although *Razzoli* recognized that a state prisoner is confined to habeas only if his successful claim would "necessarily imply" a shorter period of confinement, 230 F.3d at 375 (internal quotation marks omitted), it held that habeas is exclusive for a federal prisoner "even when a non-habeas claim would have a merely probabilistic impact on the duration of custody," id. at 373. *See Davis v. Bureau of Prisons*, No. 08-5053, 2009 WL 1791872, at *1 (D.C. Cir. June 5, 2009). This aspect of *Razzoli* is not relevant here because -- as discussed in the text -- Skinner's success in a damages action would necessarily imply the invalidity of the revocation of his good-time credits.

absent exceptional circumstances. *See Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350, 358 & n.8 (D.C. Cir. 2006). Indeed -- as amicus also correctly points out -- the Supreme Court held in *Muhammad v. Close* that the government had waived a habeas exclusivity argument by failing to raise it below. 540 U.S. at 755.

But here the government *did* raise the habeas argument in the district court, identifying it as a "third and independent ground for dismissal." Mem. in Support of Defs.' Mot. to Dismiss and/or for Summ. J. at 10 n.2. Although the government raised the point only in a footnote, that footnote cited the controlling precedent -- *Razzoli* -- and expressly "reserve[d] the right to brief [the habeas] point at some later stage of the litigation if such stage should come to pass." *Id.* That later stage never came to pass in the district court because the court ruled for the government on the basis of the exemption. But that stage has come in this court, and both the government and Skinner (and amicus) have had a full opportunity to brief the issue. Moreover, this case is not like *Muhammad*, where the government's habeas argument depended on a disputed question of fact -- whether the plaintiff had actually lost any good-time credits. 540 U.S. at 754-55. Rather, BOP's argument here raises only legal questions that we decide de novo. Thus, there is no unfairness in our affirming on this alternative ground. *Cf. United States v. Bowman*, 496 F.3d 685, 695 n.2 (D.C. Cir. 2007) (noting that an appellate court may not affirm on a ground not relied upon by the district court if doing so would "unfairly deprive [the plaintiff] of an adequate opportunity to respond").

III

We affirm the district court's dismissal of Skinner's claim for amendment of his records on the ground that those records are exempt from the amendment provision of the Privacy Act. We affirm the court's dismissal of Skinner's damages claim because such a claim is not cognizable unless Skinner first secures relief through a writ of habeas corpus.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1376
	)	(RWR)
UNITED STATES	)	
DEPARTMENT	)	[Entered: June 20, 2005]
OF JUSTICE, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on consideration of defendants' motion to dismiss or, in the alternative, for summary judgment.[1] Having considered defendants' motion, plaintiff's opposition, and the entire record of the case, the Court will dismiss this action for failure to state a claim upon which relief can be granted.

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[1] The Dismissal Order accompanying this Memorandum Opinion also addresses three pending non-dispositive motions filed in this case.

BACKGROUND

Plaintiff is a federal prisoner who currently is incarcerated at the United States Penitentiary in Atlanta, Georgia. He brings this action against the United States Department of Justice and the Federal Bureau of Prisons ("BOP") under the Privacy Act, 5 U.S.C. § 552a.

On November 27, 2001, there was a "massive shake down" in the USP Atlanta unit where plaintiff was housed. Compl. at 2 & Ex. A (Referral of an Inmate Matter for Investigation). Staff allegedly found packages containing white powder in plaintiff's locker, and the powder tested positive for cocaine. *Id.* Plaintiff countered that, not only did staff plant the packages in his locker, but also that the white powder was laundry detergent. *Id.* at 2, 3. In subsequent disciplinary proceedings, plaintiff "was found guilty of infraction code 113, possession of narcotics, marijuana, drugs or related paraphernalia not prescribed for the individual by the medical staff." Pl.'s Supp. Mem. (Pl.'s Aff.), ¶ 15; *see* Pl.'s Opp., Ex. I (Discipline Hearing Officer Report). Among the sanctions imposed were placement in disciplinary segregation and disallowance of good time conduct credit. *Id.*

Plaintiff alleges that BOP records pertaining to him in its Inmate Central Records System are incorrect. The records allegedly fail to reflect that the white powder substance was laundry detergent, not cocaine. Compl. at 3. This incorrect information, plaintiff alleges, led to adverse determinations regarding his custody classification, job and quarters assignments, among other things. He demands

monetary damages "for placement in segregation on November 27, 2001 thru March 26, 2002," and "for adverse effect in record determining custody, classification, job, quarter assignment and the lose [sic] of forty (40) days good conduct credits." Compl. at 3. He also seeks injunctive relief.[2]

DISCUSSION

A complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The ruling on a motion under Rule 12(b)(6) does not test a plaintiff's likelihood of success on the merits; rather, it tests whether a plaintiff properly has stated a claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The factual allegations of the complaint are presumed to be true and are construed liberally in plaintiff's favor. *See, e.g., United States v. Phillip Morris, Inc.*, 116 F.Supp. 2d 131, 135 (D.D.C. 2001). The Court is not obligated, however, to draw factual inferences that are not supported by the facts alleged. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

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[2] *Citing Sellers* v. *Bureau of Prisons*, 959 F.2d 307 (D.C. Cir. 1992), plaintiff asserts that defendants "did not meet requirements of Privacy Act by indicating that inmate disputed information in his files." Compl. at 1. The Court presumes that plaintiff also demands injunctive relief in the form of amendment of the relevant records.

> The Privacy Act requires that an agency:
>
> > maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as toassure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). An individual may access a federal government agency's records or information pertaining to him in a system of records, and may request amendment of records pertaining to him. *See* 5 U.S.C. § 552a(d). He may file a civil action against an agency which refuses to amend its records upon request, or fails to maintain its records with the requisite level of accuracy and completeness. *See* 5 U.S.C. § 552a(g); *Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992) (subsection (g) provides civil remedies for violations of subsection (e)(5)).

An agency may promulgate regulations to exempt any system of records within the agency from any part of the Privacy Act, except from subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), if the system of records is:

> maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including . . . correctional, probation, pardon, or parole authorities, and which consists of . . . reports identifiable to an

> individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

5 U.S.C. § 552a(j)(2) (emphasis added). Pursuant to this authority, regulations exempt BOP's Inmate Central Records System (JUSTICE/BOP-005) from subsections (c)(3) and (4), (d), (e)(2) and (3), (e)(4)(H), (e)(8), (f) and (g). *See* 28 C.F.R. § 16.97(a)(4). Consequently, insofar as plaintiff demands the amendment of the records at issue, such relief is unavailable under 5 U.S.C. § 552a(g). *See White v. United States Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998) (barring claim for amendment of presentence report maintained in Inmate Central Records System); *Risley v. Hawk*, 108 F.3d 1396, 1397 (D.C. Cir. 1997) (per curiam) (denying injunctive relief on the ground that regulations exempt BOP records from amendment provision of Privacy Act.

In addition, pursuant to 5 U.S.C. § 552a(j)(2), BOP's Inmate Central Records System is exempt from subsection (e)(5) of the Privacy Act.[3] *See* 28 C.F.R. § 16.97(j) (effective August 9, 2002); *see also* 28 C.F.R. § 16.97(k)(2). Having exempted its records from the substantive provision regarding the agency's record-keeping obligations, BOP effectively

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[3] The variation in language between section 552(e)(5) and section 552 (g)(1)(C) of the Privacy Act is "of no substantive significance." *Doe* v. *United States*, 821 F.2d 694, 698 n.10 (D.C. Cir. 1987) (*en banc*).

deprives litigants of a remedy for any harm caused by the agency's substandard record-keeping. Accordingly, insofar as plaintiff demands damages for BOP's failure to maintain records in its Inmate Central Records System pertaining to him with the requisite level of accuracy and completeness, damages are not available.

CONCLUSION

Presuming the truth of plaintiff's factual allegations and construing them liberally in plaintiff's favor, the Court concludes that the complaint fails to state a claim upon which relief can be granted. The BOP's Inmate Central Records System is exempt from the Privacy Act's accuracy and amendment provisions, such that plaintiff is not entitled to the relief he demands. Accordingly, the Court will grant defendant's motion to dismiss. A Dismissal Order accompanies this Memorandum Opinion.

Signed this 17th day of June, 2005.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1376
	)	(RWR)
UNITED STATES	)	
DEPARTMENT	)	[Entered: March 29,
OF JUSTICE, *et al.*,	)	2006]
	)	
Defendants.	)	
	)	

ORDER

This matter is before the Court on consideration of plaintiff's "Motion to Alter or Amend Judgment," which the Court construes as a Motion for Relief from Judgment or Order under Rule 60(b) of the Federal Rules of Civil Procedure.[1] Relief

[1] By its caption, it appears that plaintiff intended to file a motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Rule 59(e) requires that a motion be filed no later than 10 days after entry of judgment. Fed. R. Civ. P. 59(e). Because plaintiff's motion was filed more than 10 days after entry of the Court's June 20, 2005 Memorandum Opinion and Order, it is treated as a motion for relief

under Rule 60(b) should be used sparingly and should be applied only in extraordinary circumstances. *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988); *Piper v. United States Dep't. of Justice*, 374 F.Supp.2d 73, 78 (D.D.C. 2005). Under Rule 60(b), the Court "may relieve a party . . . from a final judgment, order, or proceeding for . . . any [] reason justifying relief from the operation of the judgment."[2] Fed. R. Civ. P.

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from judgment or order under Fed. R. Civ. P. 60(b). *See, e.g., Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 903 (D.C. Cir. 1996) ("An untimely motion under Rule 59(e) may be considered as a motion under Rule 60(b) if it states grounds for relief under the latter rule."); *Lightfoot v. District of Columbia*, 355 F. Supp.2d 414, 420-21 (D.D.C. 2005) (noting general rule that motion for reconsideration is treated as a 59(e) motion if filed within ten days of entry of challenged order, or as a 60(b) motion if filed thereafter).60(b)(6).

[2] Plaintiff does not specify the Rule 60(b) provision on which he relies. It appears that either Rule 60(b)(1) for the Court's "mistake," or the "catch-all" clause of Rule 60(b)(6) would apply. Relief under Rule 60(b)(6) is not available "unless the other clauses, (1) through (5), are inapplicable." *Goland v. Central Intelligence Agency*, 607 F.2d 339, 372-73 (D.C. Cir. 1978). A district court's authority to correct an error of legal reasoning under Rule 60(b)(1) is unclear. *See Ctr. for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 939 (D.C. Cir.

In its June 20, 2005 Memorandum Opinion and Order, the Court concluded that plaintiff failed to state a Privacy Act claim for correction of agency records pertaining to him because the records at issue, maintained in the Federal Bureau of Prisons' Inmate Central Record System, are exempt from the amendment provisions of the Privacy Act. Further, the Court concluded that plaintiff could not recover monetary damages because a regulation exempted the relevant records from the accuracy provisions, *see* 5 U.S.C. § 552a(e)(1), (5), of the Privacy Act.[3] That regulation became effective on August 9, 2002. *See* 28 C.F.R. § 16.97(j); 67 Fed. Reg. 51,754 (Aug. 9, 2002).

Plaintiff states that the "adverse determination occurred exactely [sic] (8) months November 27, 2001 before August 9, 2002 effective

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1986) (declining to address whether rule "allow[s] corrections of substantive legal errors"); *United States v. Pollard*, 290 F.Supp.2d 153, 157-58 (D.D.C. 2003) (agreeing "with those circuit courts that oppose the use of Rule 60(b) to correct legal errors"); *Ward v. Kennard*, 200 F.R.D. 137, 139 (D.D.C.) (denying Rule 60(b) motion where plaintiff "is merely arguing that the court made an error of legal reasoning"), *aff'd*, 2001 WL 1154507 (D.C. Cir. Aug. 13, 2001). Accordingly, it appears that Rule 60(b)(6) is the relevant provision here.

[3] Damages may be awarded if "the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4).

exemption of section 552a(e)(5)." Pl.'s Mot. at 2. He argues that "this action should not have been dismissed based on the Privacy Act other rights because it's a particular damage claim." *Id.* at 3. It appears that the regulation exempting BOP's Inmate Central Records System from the Privacy Act's damages provisions was not in effect at any time relevant to the complaint, and thus would not bar plaintiff's claim for monetary damages.[4]

Although inclined to grant the plaintiff's Rule 60(b) motion, the Court is without jurisdiction to do so. Before plaintiff filed the instant motion, he filed a notice of appeal.[5] "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam).

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[4] Whether plaintiff adequately states a claim for monetary damages remains to be seen.

[5] Initially, plaintiff indicates that his appeal is limited to the orders denying two particular motions, one for injunctive relief [#39] and the other pertaining to a proposed amendment to the complaint [#41]. In his motion for leave to proceed in *forma pauperis* on appeal, however, he suggests his intention to appeal "in it's [sic] entirety." See Affidavit Accompanying Permission to Appeal in Forma Pauperis [#53]. Given that pro se filings are liberally construed, see Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court presumes that plaintiff is appealing the case "in its entirety," including the June 20, 2005 Order.

Accordingly, it is hereby

ORDERED that plaintiff's motion to alter or amend [#51] is DENIED.

SO ORDERED.

Signed this 23rd day of March 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 04-1376
	) (RWR)
UNITED STATES	)
DEPARTMENT	) [Entered: March 31,
OF JUSTICE, *et al.*,	) 2008]
	)
Defendants.	)
	)

MEMORANDUM ORDER

The United States Court of Appeals for the District of Columbia Circuit has ordered plaintiff's appeal to be held in abeyance pending this court's "definitive decision whether it would grant the motion to alter or amend the judgment absent the perceived jurisdictional bar." *Skinner v. Dep't of Justice*, No. 05-5284 (D.C. Cir. Aug. 3, 2006). That motion, which this Court construes as one for relief from judgment or order under Rule 60(b) of the Federal Rules of Civil Procedure, will be denied.[1]

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[1] The Court's Memorandum Opinion and Order, signed on June 17, 2005, were entered on the docket on June 20, 2005. Because plaintiff's motion was filed more than 10 days after entry of the Order, it is

I. BACKGROUND

Plaintiff's cause of action arose from events occurring on November 27, 2001 at the United States Penitentiary in Atlanta, Georgia. There was a "massive shake down" in the unit where plaintiff was housed. Compl. at 2 & Ex. A (Referral of an Inmate Matter for Investigation). Staff allegedly found in plaintiff's locker envelopes containing a white powder substance which field-tested positive for cocaine. *Id.*, Ex. B (November 27, 2001 Memorandum to Operation Lieutenant). According to plaintiff, the white powder was laundry detergent, not cocaine. *Id.* at 3. In subsequent disciplinary proceedings, plaintiff was charged with and "was found guilty of infraction code 113, possession of narcotics, marijuana, drugs or related paraphernalia not prescribed for the individual by the medical staff." Pl.'s Supp. Mem. ("Pl.'s Aff.") ¶ 15; *see* Pl.'s Opp'n to Defs.' Mot. to Dismiss or for Summ. J., Ex. I (Discipline Hearing Officer Report on Incident Report No. 941389). Among other sanctions, plaintiff was placed in disciplinary segregation for 60 days and he lost visiting privileges for one year, and good conduct credit. *Id.*, Ex. I at 2-3.

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treated as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). See, e.g., *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996); *Derrington-Bey v. District of Columbia Dep't of Corr.*, 39 F.3d 1224, 1225 (D.C. Cir. 1994).

Plaintiff brought this action against the Federal Bureau of Prisons ("BOP") under the Privacy Act, *see* 5 U.S.C. § 552a. He alleges that records pertaining to him and to the November 27, 2001 incident are incorrect.[2] Specifically, he contends that the records fail to reflect that the white powder substance found in his locker was laundry detergent, not cocaine. Compl. at 3. This incorrect information, plaintiff alleges, led to adverse determinations regarding his custody classification, job and quarters assignments, among other things. *See id.* He demands monetary damages "for placement in segregation on November 27, 2001 thru March 26, 2002," and "for adverse effect in record determining custody, classification, job, quarter assignment and the lose [sic] of forty (40) days good conduct credits." *Id.*

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[2] Plaintiff does not identify the offending records. The Court presumes that plaintiff is referring to the documents pertaining to the shake down and resulting disciplinary proceedings attached to his various filings. *See* Compl., Ex. A (Referral of an Inmate Matter for Investigation, BOP Case No. ATL-01547(3) & Ex. B (November 27, 2001 Memorandum to Operation Lieutenant regarding positive test result for cocaine); Pl.'s Opp'n to Defs.' Mot. to Dismiss or for Summ. J., Ex. I (Discipline Hearing Officer Report regarding Incident Report No. 941389) & Ex. J (Investigation dated January 21, 2002). Other attachments pertaining to his requests for information under the Freedom of Information Act do not appear relevant to his Privacy Act claims.

The Court granted defendants' motion to dismiss. *Skinner v. United States Dep't of Justice*, No. 04-1376, 2005 WL 1429255, at *3 (D.D.C. June 17, 2005). As is stated in the supporting Memorandum Opinion, the Court found that plaintiff's claims were barred because regulations promulgated by BOP's Director exempt the Inmate Central Records System, where the allegedly incorrect records are maintained, from the amendment and damages provisions of the Privacy Act. *Id.*, 2005 WL 1429255, at *2; *see* 28 C.F.R. § 16.97(a)(4). In addition, because regulations exempt the Inmate Central Records System from the accuracy provision of the Privacy Act, *see* 28 C.F.R. § 16.97(j) (effective August 9, 2002), the Court concluded that BOP effectively deprives plaintiff of a remedy for harm caused by alleged inaccurate recordkeeping. *Skinner*, 2005 WL 1429255, at *2.

In his Rule 60(b)(6) motion, plaintiff notes that the "adverse determination occur[r]ed exact[]ly (8) months November 27, 2001 before August 9, 2002 effective exemption of section 552a(e)(5)." Motion to Alter or Amend Judgment ("Pl.'s Mot.") at 2 (emphasis in original). Although this statement is inartfully written, the Court construes it as an assertion that his claim for damages survives because the regulation exempting the Inmate Central Records System from the accuracy provision of the Privacy Act was not effective at the time the underlying incident occurred.[3]

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[3] The effective date of the regulation is of questionable significance. One federal district court determined that, when BOP's Director promulgated regulations to exempt the Inmate Central Records

II. DISCUSSION

A plaintiff "must clear a very high bar to obtain relief under Rule 60(b)(6)." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). "[M]otions to reconsider under Rule 60(b)(6) apply only to 'extraordinary situations' and 'should be only sparingly used.'" *United States v. Pollard*, 290 F. Supp. 2d 153, 157 (D.D.C. 2003) (quoting *Twelve John Does v. District of Columbia*, 841 F.2d 1133,

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System from the Privacy Act's accuracy provision, "any inchoate § 552a(e)(5) claim [a plaintiff] may once have had was extinguished." *Williams v. Farrior*, 334 F. Supp. 2d 898, 905 (E.D. Va. 2004), *aff'd*, 122 Fed. Appx. 65 (4th Cir.) (*per curiam*), *cert. denied*, 546 U.S. 907 (2005). In that case, the court rejected a prisoner's claim for damages where the alleged Privacy Act violation occurred seven weeks before effective date of the regulations exempting the Inmate Central Records System from subsection (e)(5). *Id.*, 334 F. Supp. 2d at 905. In another case, a federal district court proceeded to determine whether a plaintiff was entitled to damages under the Privacy Act, *see* 5 U.S.C. § 552a(g)(1)(C), (g)(4), where the complaint challenging the accuracy of a Disciplinary Hearing Officer report was filed in 1999, roughly three years before BOP's Director promulgated the regulations exempting BOP records from the Act's accuracy provision. *Cordero v. Bureau of Prisons*, No. 4:99-2165, 2005 WL 1205808, at *3 (M.D. Pa. Apr. 27, 2005) (Magistrate Report and Recommendation).

1140 (D.C. Cir. 1988)); *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). "[A]s a precondition to relief under Rule 60(b), the movant must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995) (citation omitted). However extraordinary the remedy, "it is within the district court's discretion to grant [relief under Rule 60(b)] in order to do justice." *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir.) (citing *Klapprott v. United States*, 335 U.S. 601(1949)), *reh'g denied*, 817 F.2d 761(11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

The Privacy Act requires that an agency:

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as to assure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). An individual may file a civil action against the agency if it:

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the

> basis of such record, and consequently a determination is made which is adverse to the individual.

5 U.S.C. § 552a(g)(1)(C); *see Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992) (subsection (g) provides civil remedies for violations of subsection (e)(5)). In a civil suit filed pursuant to 5 U.S.C. § 552a(g)(1)(C), if the agency's actions were willful or intentional, the Court may award actual damages sustained by the individual as a result of the agency's recordkeeping failures. 5 U.S.C. § 552a(g)(4)(A).

In order to recover monetary damages under the Privacy Act, "a plaintiff must assert that an agency failed to maintain accurate records, that it did so intentionally or willfully, and, consequently, that an 'adverse' 'determination [wa]s made' respecting the plaintiff." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002) (quoting 5 U.S.C. § 552a(g)(1)(C)). Plaintiff bears the burden of proving that the agency's actions in violating thePrivacy Act were intentional or willful. *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984); 5 U.S.C. § 552a(g)(4). To meet his burden, plaintiff "must prove that the offending agency acted 'without grounds for believing [its actions] lawful' or that it 'flagrantly disregarded'the rights guaranteed under the Privacy Act." *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (quoting *Albright*, 732 F.2d at 189). This is a high standard, requiring a showing of "something greater than gross negligence" on the agency's part. *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

Plaintiff's first challenge is to show that BOP failed to maintain accurate records pertaining to him. *See Toolasprashad*, 286 F.3d at 583. In this case, the alleged inaccuracy in BOP's records is, essentially, the identity of the white powder substance found in plaintiff's locker. BOP records reflect that the substance tested positive for cocaine; plaintiff insists that the substance was laundry detergent. Plaintiff's sole support for his position is the Federal Bureau of Investigation's decision to decline to pursue the matter for criminal prosecution. *See* Compl., Ex. A (Referral of an Inmate Matter for Investigation, BOP Case Number ATL-01547); Pl.'s Mot. at 2 & Ex. 8 (February 12, 2002 letter from A. Lavelle, Supervisory Special Agent, FBI, declining BOP Case No. 01547, among others). According to the FBI, plaintiff's case "lack[s] the criteria to meet prosecutive guidelines that would result in a criminal prosecution of greater penal consequences than [those] which can be imposed by the BOP administrative remedies and actions." Pl.'s Mot., Ex. 8 at 1. The FBI's decision neither refutes the results of the field test conducted by BOP staff nor establishes that the white powder substance was laundry detergent. The plaintiff has failed to show that the relevant BOP records are inaccurate. *See Doyharzabal v. Gal*, No. 7:00-2995-24BG, 2001 WL 35810671, at *3 (D.S.C. Sept. 13, 2001) (plaintiff who offered "little other than bare assertions to support his claim that disputed statements regarding contraband and gang membership were inaccurate" did not establish that BOP records pertaining to him were inaccurate). Without some indication that BOP has failed to maintain accurate records pertaining to plaintiff, it follows that he cannot show that BOP violated his

rights under the Privacy Act and that the agency did so willfully or intentionally. *See Doyon v. United States Dep't of Justice*, 304 F. Supp. 2d 32, 35 (D.D.C. 2004) (plaintiff who was unable to establish that prior drug conviction and probation violation charges reflected in presentence investigation report maintained in Inmate Central Records System were clearly wrong did not demonstrate intentional or willful violation of his rig' ts under the Privacy Act), *appeal dismissed*, 2004 WL 2185923 (D.C. Cir. Sept. 24, 2004).

Furthermore, insofar as plaintiff challenges the Disciplinary Hearing Officer's decision and the disciplinary sanctions imposed, *see* Compl. at 3; Pl.'s Mot. at 2, the Privacy Act is not the proper vehicle for doing so. "The [Privacy] Act [] is intended to remedy 'factual or historical errors,' and is not a vehicle for addressing 'the judgments of federal officials . . . reflected in records maintained by federal agencies.'" *Velikonja v. Mueller*, 362 F. Supp. 2d 1, 16 (D.D.C. 2004) (quoting *Kleiman v. Dep't of Energy*, 956 F.2d 335, 337-38 (D.C. Cir. 1992)), *aff'd*, 466 F.3d 122 (D.C. Cir. 2006) (per curiam); *see Levant v. Roche*, 384 F. Supp. 2d 262, 270-71 (D.D.C. 2005) (noting that "[p]laintiff's true complaint is not about the accuracy of his records, but about the underlying decision they reflect"); *Doyon*, 304 F. Supp. 2d at 34-35 (finding that the Privacy Act is not the means for prisoner to challenge BOP's use of the information or professional judgment of its staff in establishing his custody classification).

Granting plaintiff's motion would be a mere futile gesture as he sets forth no extraordinary

circumstances warranting relief under Rule 60(b)(6). Accordingly, it is hereby

ORDERED that plaintiff's Motion to Alter or Amend Judgment [Dkt. #51] is DENIED.

SO ORDERED.

Signed this 22nd day of March 2008.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5284 **September Term 2009**

04cv01376

Filed On: December 30, 2009

Frank A. Skinner,
Appellant

v.

United States Department of Justice and
Bureau of Prisons,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards and Randolph, Senior Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: */s/*
Michael C. McGrail
Deputy Clerk

APPENDIX F

STATUTORY PROVISIONS

5 U.S.C. § 552a – Records maintained on individuals

(a) Definitions. For purposes of this section–

(1) the term "agency" means agency as defined in section 552[(f)](e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an

identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement

of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to *section 6103(d) of the Internal Revenue Code of 1986* [*26 USCS § 6103(d)*], (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code [*26 USCS § 6103(b)(4)*], (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act [*42 USCS § 604(e), 664*, or 1337]; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act [*42 USCS § 1320b-7*];

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in *section 6103(k)(8) of the Internal Revenue Code of 1986* [*26 USCS § 6103(k)(8)*]; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (*42 U.S.C. 402(x)(3), 1382(e)(1)*);

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the

Government of the United States (including survivor benefits).

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this *title [5 USCS § 552]*;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the

control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office [Government Accountability Office];

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures. Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records. Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise

statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements. Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any party of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources or records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to

assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this *title [5 USCS § 553]*, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to

an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g) Civil remedies.

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such

record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation

costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $ 5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $ 5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $ 5,000.

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5*

USCS §§ 553(b)(1), (2), and (3), (c), and (e)], to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency, or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)]*, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1), (2), and (3), (c), and (e)]*, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this *title [5 USCS § 552(b)(1)]*;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment,

military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)]*, the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival records.

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section,

be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section [effective 270 days following Dec. 31, 1974], shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement

for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A) (i) the agency has independently verified the information; or

(ii) the Date Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to

subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report. The President shall biennally submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974 [note to this section].

(t) Effect of other laws.

(1) No agency shall rely on any exemption contained in section 552 of this *title [5 USCS § 552]* to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this *title [5 USCS § 552]*.

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of

agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4) (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5) (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement

may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities. The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.